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SUPREME COURT, U. S.

No. 73-491

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In the Supreme Court of the United States

OCTOBER TERM, 1973

THOMAS LEE LIVINGSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there is insufficient evidence to support his conviction for wilful failure to report for induction.

After a jury-waived trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of failure to report for induction into the Army, in violation of 50 U.S.C. App. 462. On the first appeal, the sentence was vacated and the case was remanded for findings of fact (Pet. App. 1a). The trial court filed an opinion including findings of fact and conclusions of law, again finding petitioner guilty (Pet. App. 9a). Imposition of sentence was suspended and petitioner was placed on probation for 26 months, upon condition that he perform civilian work in the national interest for two years. The court of appeals affirmed (Pet. App. 22a), and a motion for

rehearing was denied on April 16, 1973 (Pet. App. 24a). The petition for certiorari was filed on September 15, 1973, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.[1] In any event, there is no reason to grant the writ.

The evidence shows that on April 23, 1968, an order to report for induction on May 16, 1968, was mailed to the latest address petitioner had given his local board, on Grand Avenue in Chicago (Pet. App. 32a). The letter was returned to the board by the post office and remailed to petitioner at his permanent address, on Center Street in Mount Wolf, Pennsylvania, where his parents resided (T. 40-41, 55).[2] That letter was not returned by the post office or by petitioner's parents, who had on a previous occasion returned a letter and given the board a new address for petitioner (App., *infra*). Petitioner testified that he was living at the Grand Avenue address in late April, 1968, but never received the order to report (Pet. App. 48a). The district court resolved this dispute in the evidence by find-

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[1] An application for an extension of time was received by the Clerk of the Court on June 13, 1973, but was returned to petitioner as untimely filed (Pet. 2).

[2] Petitioner is in error in stating that the uncontradicted evidence showed that the induction notice was not remailed to his permanent address (Pet. 5, 6, 10). The secretary of the board testified that she had personal knowledge of the file (T. 14) and that the order was remailed (T. 55). It is true that she testified that the notice was remailed on April 2, 1968 (T. 40-41)—an obviously mistaken date, since the order was not originally mailed until April 23, 1968. The mistake may have stemmed from a clerical error on the delinquency report in petitioner's file (Pet. App. 38a). This erroneous testimony was discussed in the memorandum and order denying petitioner's motion to vacate (Pet. App. 19a, 20a), where the trial court held that it related only to the credibility of the witness.

ing as a fact that petitioner received the order to report for induction (Pet. App. 17a, 21a).[3] Since petitioner offered no other justification for his failure to report for induction, the court found that his failure to report was wilful, and convicted him. The evidence, viewed in the light most favorable to the government, was sufficient to sustain the conviction.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[3] This case does not, therefore, involve the question whether, if a registrant fails to keep the board apprised of his address, and an order for induction is mailed to a former address and never received by the registrant, the registrant may be convicted of failure to report for induction.

[4] Petitioner's reliance on *Gutknecht* v. *United States*, 396 U.S. 295 (Pet. 12, n. 6), for the proposition that he was ordered for induction out of turn is misplaced. In *Gutknecht*, the defendant was inducted because he exercised his First Amendment rights. In the instant case, petitioner would have been inducted in the normal course of events on May 10, 1966, if he had not joined VISTA (Pet. App. 11a). His order to report, made after he completed VISTA, was not a penalty for exercising rights but merely a completion of the course of events begun in 1966.

APPENDIX

SELECTIVE SERVICE SYSTEM

Local Board No. 173
3rd Fl. Sherrill Bldg.
9 W. Philadelphia St.
York, Penna. 17403
(local board stamp)

In reply, refer to:

13 May 1966

RE: SS No. 36-173-44-64

Thomas Lee Livingston
809 Center Street
Mt. Wolf, Penna. 17347

Dear Sir:

Kindly advise this local board, immediately, why you failed to report for induction on May 10th, 1966, as ordered.

FOR THE LOCAL BOARD

M. Catharine Grove, Clerk

Local Board No. 173
3rd Fl. Sherrill Bldg.

May 16 1966

9 W. Philadephia St.
York, Penna. 17403

Dear Sirs,

The above letter came to our home, and we are at a loss in knowing what to do about it. It was our

understanding that you were aware Tom was in Vista as of May 1st. Please take this up with them.

Sincerely,
Mr. & Mrs. Dan'l Livingston

Address of Vista, etc. is below

Mr. T. L. Livingston
c/o Marjorie D. Kelly
Training Director, Vista
N.C. Fund Inc.
Box 687 Durham, N.C.